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No. 86-28 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1986

NORFOLK DREDGING COMPANY, PETITIONER

v.

SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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21 pp

QUESTION PRESENTED

Whether the Occupational Safety and Health Administration retains authority to enforce standards relating to crane safety, promulgated pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. (& Supp. II) 651 *et seq.*, aboard an uninspected vessel in navigable waters, where no other federal agency has exercised authority to regulate the particular hazard or to regulate generally the working conditions of seamen aboard uninspected vessels.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 783 F.2d 1526. The order of the district court (Pet. App. 12a-18a) is reported at 595 F. Supp. 517.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19a-20a) was entered on March 10, 1986, a petition for rehearing was denied on April 14, 1986 (790 F.2d 88 (Table)), and the petition for a writ of certiorari was filed on July 14, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates a dredge known as the *Jekyll Island* in navigable waters off the west coast of Florida (Pet. App. 2a, 12a). As petitioner concedes (Pet. 2), the *Jekyll*

Island is an uninspected vessel under Coast Guard standards (Pet. App. 8a-9a, 12a).[1] On April 30, 1984, one of petitioner's employees was killed and another injured when the boom of a crane located aboard one of the *Jekyll Island's* two uninspected barges suddenly fell (*id.* at 2a, 12a). In response to an employee complaint alleging that crane equipment aboard that barge was inadequately maintained, an Occupational Safety and Health Administration (OSHA) compliance officer attempted to inspect the *Jekyll Island* (*id.* at 2a, 13a).[2] Petitioner refused to permit the compliance officer to conduct the inspection (*ibid.*).

2. Respondent obtained an ex parte administrative warrant from a United States magistrate to inspect the *Jekyll Island* and its barges (Pet. App. 2a, 13a). See 29 C.F.R. 1903.4. Petitioner unsuccessfully moved the magistrate to quash the warrant before its execution (Pet. App. 2a, 13a). On appeal, the district court agreed to quash the warrant, citing Section 4(b)(1) of the Occupational Safety and Health Act (OSH Act), 29 U.S.C. 653(b)(1), which precludes OSHA from asserting its authority over "working conditions of employees with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."

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[1]Certain vessels are subject to Coast Guard inspection. 46 U.S.C. (Supp. II) 3301. Those not subject to inspection, including most tugboats and towing vessels, all fishing vessels, many seagoing barges, and freight vessels under 15 tons, are deemed to be "uninspected vessels." 46 U.S.C. (Supp. II) 2101(43), 3301, 3302.

[2]Pursuant to its statutory authority to investigate marine casualties, 46 U.S.C. (Supp. II) 6301, the Coast Guard initiated an investigation of the death (Pet. App. 2a). Such an investigation is limited to determining such things as the cause of the fatality and whether any applicable laws were violated; unless a Coast Guard regulation has been violated, the investigating officer will make only nonbinding "recommendations" for the prevention of future accidents. 46 U.S.C. (Supp. II) 6301; 46 C.F.R. 4.01-01 to 4.40-35. See note 8, *infra*.

In the district court's view, "the Coast Guard's 'comprehensive regulation and supervision of seamen's conditions' aboard vessels operating in navigable waters [are] sufficiently 'general and pervasive as to displace OSHA coverage of it entirely' " (Pet. App. 15a-16a (quoting *Donovan* v. *Texaco, Inc.*, 720 F.2d 825, 826 & n.1 (5th Cir. 1983)).[3] In support of this conclusion, the court cited (Pet. App. 17a-18a), among other things, Coast Guard provisions ensuring the seaworthiness of a vessel (46 U.S.C. 653, 658 (now codified at 46 U.S.C. (Supp. II) 10901, 10902(a), 10906-10908)), requiring an investigation of accidents aboard ship (46 C.F.R. 4.01-4.40), and regulating certain safety equipment, such as lifesaving and firefighting equipment, aboard uninspected vessels (46 C.F.R. Pts. 24, 25, 26).

The district court specifically rejected the Second Circuit's conclusion in *Donovan* v. *Red Star Marine Services, Inc.*, 739 F.2d 774 (1984), cert. denied, No. 84-590 (Feb. 25, 1985), that the Coast Guard's minimal regulation of safety and health aboard the uninspected-vessel fleet displaces OSHA's authority only over particular working conditions actually addressed by the Coast Guard (Pet. App. 13a-15a). The district court relied on its perception that the *Texaco* court had recognized a "general industry-wide exemption for seamen" (Pet. App. 15a), and held that *Red Star's* distinction between inspected and uninspected vessels lacked "legal significance" (*ibid.*).

3. The court of appeals reversed. The court agreed with the Second Circuit that the Coast Guard's "circumscribed" authority to regulate employee health and safety aboard uninspected vessels does not divest OSHA of authority over

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[3]The district court mistakenly cited *Texaco* as a decision of the Eleventh Circuit. In fact, *Texaco* was decided by the Fifth Circuit after the Eleventh Circuit was created.

the uninspected-vessel fleet (Pet. App. 9a, 11a).[4] The court quoted the observation of that court in *Red Star* (739 F.2d at 777) that "the Coast Guard has historically viewed its authority to regulate uninspected vessels as limited to the regulation of life-saving and fire fighting equipment, backfire flame control, ventilation, the reporting of casualties and the licensing of operators" (Pet. App. 9a), and noted that the Coast Guard has unsuccessfully sought congressional expansion of its authority to regulate uninspected vessels (*id.* at 9a n.4).

Because the Coast Guard thus had not exercised any authority to regulate the working condition at issue in this case—crane safety—the court found that OSHA retained authority (Pet. App. 8a-9a). The court also observed that, under petitioner's analysis, "no federal agency would have the authority to regulate the safety of crane equipment aboard uninspected vessels" and found such a result "clearly contrary to the legislative intent of section 4(b)(1)" (*id.* at 9a): " 'Congress obviously wanted . . . health and safety conditions [aboard uninspected vessels] to be regulated . . . by *some* agency since it took the unusual step of requiring an actual exercise of authority to forestall OSHA coverage.' " *Ibid.* (bracketed phrase and omissions inserted by court of appeals) (quoting *Southern Pacific Transportation Co.* v. *Usery*, 539 F.2d 386, 389 (5th Cir. 1976) (emphasis in original), cert. denied, 434 U.S. 874 (1977)).

The court found the Fifth Circuit's decision in *Texaco* distinguishable (Pet. App. 10a). It noted that the issue in *Texaco* was whether the Coast Guard had in fact exercised authority over a particular working condition aboard an

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[4]Indeed, the court suggested that, even if the Coast Guard had more pervasively regulated the uninspected-vessel fleet, OSHA would retain authority over "precise working condition[s]" left unregulated (Pet. App. 10a-11a).

inspected vessel. The Fifth Circuit in *Texaco* concluded that the Coast Guard had "provided protection parallel to that which the OSHA regulatory scheme provided" and, accordingly, found OSHA divested of authority (Pet. App. 10a). "Thus, the [Fifth Circuit] had no occasion to recognize that the Coast Guard's comprehensive regulatory scheme relates primarily to seamen aboard inspected vessels" (*ibid.*). Likewise, the court found the Fifth Circuit's earlier decision in *Clary* v. *Ocean Drilling & Exploration Co.*, 609 F.2d 1120 (1980), distinguishable because the court had found that OSHA had no regulations applicable to the working condition at issue in that case and thus had "exercised no jurisdiction which could be preempted" (Pet. App. 10a n.5).[5]

ARGUMENT

The court of appeals correctly concluded that the Coast Guard's minimal regulation of working conditions on uninspected vessels affecting employee health and safety—which does not include regulation of the working condition of crane safety—does not, under 29 U.S.C. 653(b)(1), displace OSHA's regulation of crane safety aboard uninspected vessels. The decision below is in accord with the only other court of appeals decision dealing with OSHA's authority over the uninspected—vessel fleet. *Donovan* v. *Red Star Marine Services, Inc., supra.* This Court denied certiorari in *Red Star,* in which the petitioner made precisely the same arguments and cited precisely the same authorities as petitioner does here.

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[5]The Secretary also maintained in the court of appeals that petitioner could not raise its preemption argument in warrant enforcement proceedings, but must first exhaust administrative remedies by submitting to the inspection and contesting any citations issued as a result in proceedings before the Occupational Safety and Health Review Commission. See 29 U.S.C. 659. The court of appeals rejected this argument (Pet. App. 4a-8a).

Moreover, petitioner does not challenge the conclusion of the court of appeals that the Coast Guard lacks statutory authority to regulate generally the working conditions on uninspected vessels (Pet. App. 9a & n.4). See also *Red Star*, 739 F.2d at 777. The result of petitioner's position would therefore be to exclude the employees on petitioner's uninspected vessels from any general safety protection. There is no reason to believe that Congress intended to leave such a gap in coverage when it enacted the OSH Act. Review by this Court is therefore unwarranted.

1. As this Court has recognized, the OSH Act is to be "liberally construed to effectuate [its] congressional purpose" "to prevent occupational deaths and serious injuries." *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 13, 11 (1980) (footnote omitted). Other courts have accordingly interpreted OSHA's jurisdictional reach expansively, concluding that "[e]mployees should not lightly be denied the protection of OSHA" (*Marshall* v. *Northwest Orient Airlines, Inc.*, 574 F.2d 119, 122 (2d Cir. 1978)), and that 29 U.S.C. 653(b)(1) must "be construed to achieve the maximum protection for the industrial workers of the Nation." *Southern Railway* v. *OSHRC*, 539 F.2d 335, 338 (4th Cir.), cert. denied, 429 U.S. 999 (1976); accord, *Southern Pacific Transportation Co.* v. *Usery*, 539 F.2d 386, 392 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977); *Columbia Gas of Pennsylvania, Inc.* v. *Marshall*, 636 F.2d 913, 918 (3d Cir. 1980).

Courts interpreting the statutory exemption have found, on the basis of the legislative history and other factors, that OSHA loses authority only if the sister agency both possesses statutory power to regulate working conditions of employees and actually exercises that power. The "mere existence" of statutory authority is insufficient. *Southern Pacific*, 539 F.2d at 389-391; accord, *PBR, Inc.* v. *Secretary of Labor*, 643 F.2d 890, 896 (1st Cir. 1981); *Southern*

Railway, 539 F.2d at 336-337. The sister agency must actually take some steps toward exerting its statutory authority to regulate working conditions. See, *e.g.*, *Ensign-Bickford Co.* v. *OSHRC*, 717 F.2d 1419, 1421 (D.C. Cir. 1983), cert. denied, 466 U.S. 937 (1984); *Columbia Gas*, 636 F.2d at 918; *Baltimore & Ohio Railroad* v. *OSHRC*, 548 F.2d 1052, 1055 (D.C. Cir. 1976).

Moreover, the sister agency's exercise of authority must be designed to protect a class of workers, not merely to effectuate an unrelated goal. See *Organized Migrants in Community Action, Inc.* v. *Brennan*, 520 F.2d 1161, 1169 (D.C. Cir. 1975). And the courts have rejected the notion that an entire industry is exempt from the OSH Act simply because a sister agency has issued regulations affecting an employee class within the industry. *Southern Railway*, 539 F.2d at 338 (railroad employees in offices, shops, and repair facilities, whose working conditions are unregulated by the Department of Transportation, are not exempt from OSH Act coverage, even though employees in over-the-road operations are more extensively regulated by the Department of Transportation). As one court of appeals has put it, "the phrase 'working conditions' [does not have] a meaning which never appears elsewhere in OSHA—that of 'industries.' " *Southern Pacific*, 539 F.2d at 390; accord, *Southern Railway*, 539 F.2d at 339; *Baltimore & Ohio Railroad*, 548 F.2d at 1054.[6]

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[6]OSHA's authority is displaced if the sister agency has addressed the precise hazard at issue, even though it has not done so in the same manner as OSHA. See, *e.g.*, *PBR, Inc.*, 643 F.2d at 896; *Southern Pacific*, 539 F.2d at 391. Several courts have further refined the definition of "working conditions." Compare *Southern Railway*, 539 F.2d at 339 (working conditions include the "environmental area in which an employee customarily goes about his daily tasks"), and *U.S. Air, Inc.* v. *OSHRC*, 689 F.2d 1191, 1193 (4th Cir. 1982) (same), with *Southern Pacific*, 539 F.2d at 391 (working conditions embrace both "surroundings," expressed as a general problem, and "hazards," expressed as a location, category, or specific item).

2. Against this background, the court of appeals correctly concluded that OSHA was not divested of authority in this case. As an initial matter, petitioner's assertion that "the Coast Guard has exercised statutory authority to regulate and supervise the working conditions of seamen serving on navigable waters" (Pet. 3-4) sweeps far too broadly. The Coast Guard has indeed extensively regulated working conditions aboard inspected vessels,[7] but it has issued only a few regulations that even affect the working conditions of employees aboard uninspected vessels, and most of those regulations are addressed to water and navigational safety generally or to nonsafety objectives rather than to the working conditions of a class of employees as such (see *Red Star*, 739 F.2d at 779-780). Uninspected vessels are subject only to regulations governing lifesaving equipment (46 C.F.R. Subpt. 25.25), firefighting equipment (46 C.F.R. Subpt. 25.30), backfire flame control (46 C.F.R. Subpt. 25.35), ventilation (46 C.F.R. Subpt. 25.40), liquefied petroleum gas (46 C.F.R. Subpt. 25.45), navigational warning devices (46 C.F.R. Subpt. 25.05 (1982)), marine casualty reporting (46 C.F.R. Subpt. 26.08), personnel licensing (46 C.F.R. 26.25-1), load lines (46 C.F.R. 42.01-1), nautical "rules of the road" (46 C.F.R. Subpts. 4.01-4.40), pollution control (33 C.F.R. Pts. 151-159), and navigational aids (33 C.F.R. Pts. 60-76). Moreover, not all of these regulations apply to all uninspected vessels. Plainly these few regulations affecting uninspected vessels do not, as petitioner suggests, comprehensively cover working conditions on uninspected vessels.

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[7]Compare 46 C.F.R. Pts. 24, 25, and 26 (uninspected vessels), with 46 C.F.R. Pt. 31 (inspection and certification requirements for tank vessels); 46 C.F.R. Pt. 71 (inspection and certification requirements for passenger vessels); and 46 C.F.R. Pt. 91 (inspection and certification requirements for cargo and miscellaneous vessels). Indeed, the Secretary and the Coast Guard have executed memoranda of understanding that recognize the pervasive Coast Guard regulation of inspected vessels. See 45 Fed. Reg. 14987 (1980); 48 Fed. Reg. 11365 (1983).

Petitioner does not in fact seriously maintain that the Coast Guard's limited regulation of the uninspected-vessel fleet suffices to displace OSHA's authority. Rather, petitioner seeks to merge two discrete classes of employees—those aboard inspected vessels and those aboard uninspected vessels—so as to conclude that the Coast Guard has regulated the entire industry. This broad conclusion is simply a variation of the notion, consistently rejected by the courts of appeals, that any exercise of regulatory authority by a sister agency that reaches any aspect of working conditions exempts every aspect of the affected industry from OSHA's authority. See *Southern Pacific*, 539 F.2d at 390; *Southern Railway*, 539 F.2d at 338-339; *Baltimore & Ohio Railroad*, 548 F.2d at 1054.

It is also significant that, as the court of appeals noted (Pet. App. 9a), the Coast Guard has not regulated crane safety on uninspected vessels because it does not believe it has statutory authority to do so. Thus, the Coast Guard has not simply failed to exercise recognized statutory authority; it maintains that it lacks authority to regulate further.[8]

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[8]Although petitioner asserts that the *Jekyll Island* is now subject to duplicative regulation by OSHA and the Coast Guard (Pet. 7), it nowhere identifies any applicable Coast Guard regulation addressing in any manner the working condition of crane safety or maintenance. As shown above, the Coast Guard's limited regulation of the uninspected-vessel fleet simply does not cover this working condition. Petitioner notes (Pet. 2) that the Coast Guard conducted a fatality investigation in this case but properly does not assert that its authority to do so (see 46 U.S.C. (Supp. II) 6301; 46 C.F.R. Pt. 4) expands the scope of its enforcement authority. Unless a Coast Guard regulation has been violated, the investigating officer will make only nonbinding "recommendations" for the prevention of future accidents. See 46 C.F.R. 4.07-1, 4.07-10. Such recommendations do not constitute standards or regulations affecting occupational safety or health capable of triggering Section 4(b)(1), since "[t]he goal of the Act is to prevent the first accident, not to serve as a source of consolation for the first victim or his survivors." *Mineral Industries & Heavy Construction Group* v. *OSHRC*, 639 F.2d 1289, 1294 (5th Cir. 1981); see also *Southern Pacific*, 539 F.2d at 391; *Dillingham Tug & Barge Corp.*, 10 O.S.H. Cas. (BNA) 1859, 1866 (1982) (Cottine, Comm'r, dissenting).

3. Notwithstanding occasional broad statements quoted by petitioner (Pet. 4-6), the question presented is not the subject of any square conflict among the courts of appeals. The only two courts of appeals that have directly confronted the extent of Coast Guard regulation of the uninspected-vessel fleet (the court below and the Second Circuit in *Red Star*) are in agreement that the Coast Guard has not displaced OSHA regulation of uninspected vessels. The decisions of other courts of appeals, on which petitioner relies, do not address the significance of the fact that the uninspected-vessel fleet is virtually unregulated. Moreover, in each of the cases cited by petitioner, the holding did not have to rest on a finding of a statutory, industrywide exemption. The quoted statements by other courts of appeals, to the effect that all seamen are exempt from OSH Act coverage, are merely dicta that those courts would not necessarily follow in an uninspected-vessel case arising today. In the absence of an actual conflict on the issue that is presented in this case, certiorari should be denied. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387 (1923).

In *Donovan* v. *Texaco, Inc.*, 720 F.2d 825 (1983), the Fifth Circuit found that an OSHA employee protection provision could not be enforced aboard an *inspected* vessel that was, as the Secretary acknowledged (720 F.2d at 826, 827 n.3), subject to pervasive regulation by the Coast Guard. Because the vessel was inspected and thus subject to pervasive regulation, the Secretary conceded that the exemption provided by 29 U.S.C. 653(b)(1) was generally applicable. The question in *Texaco* was whether the OSHA provision was applicable notwithstanding the exemption, and the court held that it was not, in light of a Coast Guard regulation providing parallel protection. The court did say broadly that all seamen are exempt from OSH Act coverage, but this statement was unnecessary to its decision, and

the facts of *Texaco* did not require the court to consider the distinction between inspected and uninspected vessels recognized in *Red Star* and in this case. Indeed, at one point the court explicitly criticized the "invariable industry-wide exemption construction" urged by petitioner here, rejecting the notion "that at the moment a dominant agency exercises its regulatory authority on any aspect of an industry, OSHA's regulatory scheme is thereby completely abrogated as to that industry" (720 F.2d at 826 n.1).

In the Fifth Circuit's prior decision in *Clary* v. *Ocean Drilling & Exploration Co.*, 609 F.2d 1120 (1980), the court did not consider the distinction between inspected and uninspected vessels or even mention whether the vessel at issue was inspected. The court based its decision in part on a finding that the proffered OSHA regulations did not appear relevant to any working conditions on the vessel involved. *Id.* at 1122. The decision, reached in a Jones Act case in which the government did not participate, was also based on an erroneous finding that the Occupational Safety and Health Review Commission "has disclaimed an intention to promulgate standards applicable to seamen." *Ibid.* It is the Secretary, not the Commission, that has authority to promulgate regulations (see note 10, *infra*), and the Secretary has determined that he does have authority over working conditions of employees aboard uninspected vessels; accordingly, *Clary's* broad language rests on an erroneous premise.

The Fourth Circuit decisions cited by petitioner also do not squarely address the exemption issue with respect to uninspected vessels. In *Taylor* v. *Moore-McCormack Lines, Inc.*, 621 F.2d 88 (4th Cir. 1980), the question was whether Coast Guard regulations applied to longshoremen, not whether Coast Guard regulations applied to seamen. The court held that longshoremen are under the authority of OSHA, not the Coast Guard. Accordingly, it never

considered the distinction between inspected and uninspected vessels and the impact of that distinction on whether, under 29 U.S.C. 653(b)(1), Coast Guard regulations displace OSHA's authority with respect to uninspected vessels. The other Fourth Circuit decision, *Barger* v. *Mayor of Baltimore*, 616 F.2d 730, cert. denied, 449 U.S. 834 (1980), likewise did not address the statutory exemption. *Barger* was a Jones Act tort suit, and the government was not a participant. The court was called on to decide whether a violation of OSHA standards, constituting negligence per se, had occurred. The court held that the employer had not preserved in the trial court its claim that OSHA's regulation was inapplicable (616 F.2d at 733), but it stated in dictum that the Coast Guard, not OSHA, had authority over the working condition at issue. That dictum, however, was based on a construction of the Secretary's regulations themselves, not the statute, as excluding seamen from coverage (616 F.2d at 732). When the question has been squarely presented, the Fourth Circuit has held that the statutory exemption is activated only by the actual exercise of authority by a sister agency. See, *e.g.*, *Southern Railway*, 539 F.2d at 336-337.

Finally, in *Kopczynski* v. *The Jacqueline*, 742 F.2d 555 (1984), cert. denied, No. 84-1618 (June 3, 1985), the Ninth Circuit held that the Coast Guard, not OSHA, had authority to regulate the particular working condition at issue. However, the OSHA regulation that the Jones Act plaintiff sought to invoke (see 742 F.2d at 558) was adopted from regulations issued under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. (& Supp. II) 901 *et seq.*, which, the court found, expressly excluded seamen from coverage. See 29 C.F.R. 1918.1; see

also 742 F.2d at 559 (quoting 29 C.F.R. 1915.2(b)).[9] The court's holding does not conflict with the decision below, because in *Kopczynski* the court did not consider whether the vessel in question was inspected or uninspected and did not consider the impact of that classification on the Coast Guard's preemption of OSHA's standards.

Because the decision below is compatible with these holdings of other courts of appeals, petitioner's argument (Pet. 7-8) that an uninspected vessel will or will not be subject to the OSH Act depending on the proximity of that vessel to a particular court of appeals is incorrect. Uninspected vessels have not been excluded from the Act's coverage in any jurisdiction.[10]

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[9]Pursuant to statutory authority (Section 6(a), 29 U.S.C. 655(a)), the Secretary adopted certain longshoring safety and health regulations as OSHA standards. See 29 C.F.R. Pt. 1918.

[10]Moreover, the contrary decision of the Occupational Safety and Health Review Commission in *Dillingham Tug & Barge Corp.*, 10 O.S.H. Cas. (BNA) 1859 (1982), is not entitled to deference. It is the Secretary of Labor, not the Commission, that is charged with "sole responsibility" for the administration of the Act. *Cuyahoga Valley Railway* v. *United Transportation Union*, No. 84-1634 (Nov. 4, 1985), slip op. 4 (per curiam). For this reason, it is the Secretary's interpretation of the exemption provision, rather than the interpretation by the Commission, that is entitled to judicial deference. Cf. *Whirlpool Corp.*, 445 U.S. at 11 (Secretary's interpretive OSHA regulation deserves deference). In any event, the Commission's decision in *Dillingham Tug & Barge Corp.*, is erroneous. The Commission based its decision, in part, on the incorrect assumption that the Coast Guard believes that it has authority to regulate all working conditions aboard uninspected vessels. 10 O.S.H. Cas. (BNA) at 1861 n.8. As we show in note 8, *supra*, the Coast Guard's authority to investigate maritime accidents when a fatality has occurred does not provide it with authority to regulate working conditions of seamen aboard uninspected vessels.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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